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In the Supreme Court of the United States

October Term, 1949

No. 507

DAWSON COUNTY, MONTANA and PRAIRIE COUNTY, MONTANA,

Petitioners,

vs.

MARY HAGAN, E. B. CLARK, MINNIE R. EVANS, UNITED STATES OF AMERICA, EDNA YALE, ALLEN W. YALE, RUBY YALE, RUTH PETTERSON, HANS PETTERSON, and SCOTTISH AMERICAN MORTGAGE COMPANY, LIMITED,

Respondents.

Petition for a Writ of Certiorari

to the United States Court of Appeals for the Ninth Circuit

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PETITION FOR A WRIT OF CERTIORARI
to the United States Court of Appeals
for the Ninth Circuit

To the Honorable Chief Justice and the Associate Justices of the Supreme Court of the United States:

Petitioners pray that a Writ of Certiorari issue to the United States Court of Appeals for the Ninth Circuit to review the judgment of said court affirming in part the judgment of the United States District Court for the District of Montana in the above entitled action and respectfully show to this Honorable Court:

JURISDICTION

Jurisdiction of the district court was invoked under the Act of August 1, 1888, 25 Stat. 357, 40 U. S. C. Sec. 257 and the act of October 14, 1940, 54 Stat. 1119. The jurisdiction of the United States Circuit Court of Appeals rests upon 28 U. S. C. Sec. 1291. Jurisdiction of this court rests on 28 U. S. C. Section 1254: (1)

STATEMENT OF THE CASE

This proceeding was brought by the United States to condemn 5,788.21 acres of land in Dawson and Prairie Counties, Montana (R. 4-11). On March 27, 1944, the United States filed a declaration of taking and deposited $32,389.00 as estimated compensation (cf. R. 89-90). Mary Hagan and others, for themselves and all bondholders of the Upper Glendive-Fallon Irrigation District, filed an answer and counterclaim alleging that they had a lien on the property (R. 28-42). Dawson County filed a claim asserting tax title to the lands in that county and asking distribution of $23,526.00 of the deposit (R. 43-64, 65-66) and an order was entered for the distribution to it of $10,628.57 (R. 67-68). On December 5, 1945, a "Final Judgment in Condemnation" was entered, fixing the value of the property at $32,389.00, of which $23,526.00 was for the lands in Dawson County (R. 78-90), and $7680.00 for the lands in Prairie County.

Thereafter, Dawson County filed a petition for distribution of the balance of the deposit for its lands, or $12,897.43 (R. 9-93) and the bondholders filed a petition for distribution of $22,677.81 and for an order requiring Dawson and Prairie Counties to refund to the court $3,315.06 and $327.86, respectively, by which amounts the distributions already made to them were alleged to have exceeded their proper claims (R. 94-95).

On September 4, 1947, the court held that overpayments had been made to the counties as alleged. It ordered the counties to return the overpayments to the registry of the court and entered judgment requiring the United States in the meantime to pay into court the sum of the overpayments, $3,642.92, giving it the right to recover the same from the counties (R. 98-109).

Dawson County appealed (R. 110-111) and the bondholders cross-appealed (R. 115-117). The Court of Appeals reversed the judgment and remanded the cause with directions to make findings of fact and conclusions of law and then enter such judgment as might be proper (R. 131-132). Dawson County v. Hagan, 172 F. 2d 387.

On November 24, 1948, the district court filed findings of fact, conclusions of law and judgment (R. 142-157).

On September 26, 1949, the Circuit Court of Appeals filed its opinion reversing the judgment as to the District Court's order directing the United States to pay any additional sum into Court (R. p 181) and further provided the counties were not overpaid in the amount equal to the unpaid general taxes. Except as modified the judgment was affirmed judgment in accordance with the opinion was filed and ordered September 26, 1949 (R. p 182-183).

The petition for rehearing filed by the appellant counties was denied on November 1, 1949 (R. p 183).

The opinion filed by the Circuit Court of Appeals for the Ninth Circuit has been reported. 177 Fed. (2) 186.

The basis of the action brought by the United States to condemn the lands of the petitioners is the following statement of facts showing the purpose of the action to condemn.

In March, 1940 the Farm Security Administration, an agency of the United States, began proceedings with the Boards of County Commissioners of Dawson and Prairie Counties looking to the purchase of the tax deed lands owned by the respective counties, and on September 5, 1940 Dawson County sold its lands, 4164.69 acres, for the gross sum of Twenty-three Thousand Five Hundred Twenty-six and 00/100 Dollars ($23,526.00). Under this sale option the United States went into possession of the lands described and removed fencing, buildings and other obstructions in order to develop the lands under the joint plan of the Bureau of Reclamation and the Farm Security Administration, under the newly organized Buffalo Rapids Irrigation District within which all of said lands were to be included. The public corporation hereinabove named was organized on March 19, 1938, including 17,000 acres of land to be developed by new canals and laterals, under the Bureau of Reclamation and the presidential letter of June 16, 1937 in which the plan of construction was outlined. At the time of the creation of this corporation all of the lands involved in the Upper Glendive-Fallon Irrigation District were eliminated on account of the lack of title by the counties, the tax deed proceedings not having been completed.

The Declaration of Taking filed in this action on April 27, 1942 vested title in 5788.21 acres of land, formerly a part of Dawson and Prairie Counties, Montana, in the United States of America under Section 258a, Title 40, U. S. C. A. The compensation deposited in the registry of the Court amounted to $34,489.00, with valuations on the tracts described therein as follows:

Dawson County, Montana	4164.69 acres	$23,526.00
Prairie County, Montana	1309.60 acres	7,680.00
Robert Henderson estate	158.60 acres	2,100.00
Edna Yale	103.55 acres	758.00
Scottish-American Mortgage Co.	51.77 acres	425.00

The Declaration was made by the Secretary of Agriculture and was recorded in the two counties, as well as being filed in Court, with maps of all of the separate tracts therein described attached thereto. With the exception of the Robert Henderson estate lands, the Edna Yale tract and the Scottish-American Mortgage Co. tract, the lands were all a part of the Upper Glendive-Fallon Irrigation District, created as a public corporation of Montana on December 20, 1920 and never legally dissolved, although not functioning as such under the laws of Montana since 1927. Commissioners were appointed by the District Court and qualified as such and thereafter levied assessments for the maintenance and operation of the District by resolution passed in conformity with Chapter 148, Laws of Montana 1921, fixing the irrigable

area in each forty-acre tract in said District and levying assessments on such tracts as by law provided. No other or further resolution was ever passed by the Board of Commissioners changing the irrigable area of the lands in the District, and the same became fixed, under the provisions of Chapter 157, Laws of Montana, 1923, Page 477. After these assessments were levied for operation and maintenance a bond issue was authorized and approved by the District Court on December 2, 1922 and in the order confirming the bond issue, provision was made for the levy of assessments for the payment of interest and principal of the bonds. Of the issue of $150,000 authorized there were sold to the public $81,500, the principal of which is still outstanding and unpaid, as well as accrued interest since January 1, 1928. The funds were to be used in purchasing a pumping plant, a coal mine, and for the construction of canals and laterals to irrigate the lands in said District under two lifts, a forty-foot lift and a seventy-five foot lift, neither of which lifts ever successfully functioned.

QUESTIONS PRESENTED:

I.

The ultimate question is whether the petitioners as the legal owners of the lands taken in condemnation by the United States as a matter of law are entitled to the funds deposited in court as just compensation in lieu of the lands taken on the facts specifically found by the District Court and affirmed by the Circuit Court of Appeals, where the respondents had no lien on the lands taken at the time of the filing of the Declaration of Taking by the United States.

II.

Specifically the court erred when it found "that Dawson County and Prairie County, were each paid under orders entered July 11, 1944, the full payment of general taxes and neither of said counties have any further claim on any compensation awarded or on deposit herein." (R-155).

III.

The judgment of the District Court affirmed in part by the Circuit Court of Appeals was in error when it decided, "That the sum of $17,851.89 being the balance remaining on deposit with the Registry of this Court be paid to the bondholders of the Upper Glendive-Fallon Irrigation District pro-rata," (R-156) such funds being in lieu of the lands taken from petitioners and deprives them of their money and is a taking of their property without just compensation for public use in violation of the 5th Amendment to the Constitution of the United States.

REASONS FOR THE PETITION:

The Writ prayed for should be issued for the following reasons:

I.

The Circuit Court of Appeals decided an important question of local law namely the payment of just compensation in a condemnation action to respondents who had no claim to the funds representing the purchase price of the lands taken, contrary to the applicable decisions of the Montana courts, thus completely ignoring the local law as determined in all decisions of the Montana Supreme Court upon the question.

II.

The decision of the Circuit Court affirming the District Court sets a precedent as to a fundamental question of local law in a way directly in conflict with the applicable decisions of the Montana courts namely: State ex rel Malott v. Board of Commissioners, 89 Montana 37 296 Pacific 1, in which it was pointed out that the lien of the respondent bondholders was extinguished by the tax deed to the County and further that the bondholders occupied the same status as a mortgagee as to payment of general taxes or loss of their security.

III.

The judgment of the Circuit Court of Appeals in affirming the judgment of the District court decided an important question of constitutional law, in awarding a part of the price of the lands taken by the United States to the

respondents who had no claim on the lands and hence on the funds which were deposited in the Registry of the Court in lieu of the lands taken, which judgment is a taking of the property of the petitioners for public use without just compensation in violation of the 5th Amendment to the Constitution of the United States.

IV.

The judgment awarded to the petitioners the amount of their general taxes only, which were merged in the title to the lands taken by tax deed and no longer existed as taxes. The fee to the lands passed to the petitioners free and clear of all liens, and incumbrances, including prior tax liens and the lands were not subject to future taxation for irrigation assessments under the decisions of the Supreme Court of Montana which decisions govern the Federal Courts in matters of Montana law and procedure.

WHEREFORE: your petitioners pray that a Writ of Certiorari issue to the Circuit Court of Appeals for the Ninth Circuit to review the said cause and petitioners submit herewith a certified transcript of the record below together with their supporting brief to sustain this petition.

Respectfully submitted:

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E. W. POPHAM

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CECIL N. BROWN

Attorney for Prairie County.

Brief of Petitioners

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OPINION BELOW

The views of the District Court are stated in its Decision and Order (R 98-109) which has not been reported. Appeals were taken by adverse claimants to the condemnation award from such judgment to the Circuit Court of Appeals for the 9th Circuit, which Court in its per curiam opinion filed on November 1st, 1948, (172 Fed (2) 387) remanded the case to the District Court with directions to make findings of fact, state conclusions of law and enter a proper judgment.

The District Court in accord therewith filed its findings and entered judgment on November 24, 1948. All parties appealed from the judgment and on September 26th, 1949, the Circuit Court of Appeals for the 9th Circuit filed its per curiam decision reported (177 Fed (2) 186).

JURISDICTION

The Judgment entered by the Circuit Court of Appeals for the Ninth Circuit being a final judgment, reported in (177 Fed (2) 186), jurisdiction of this Court to review the proceedings below is invoked under Section 1254, Title 28 U. S. Code.

QUESTIONS PRESENTED

The petitioners as the owners of the lands taken in a condemnation action claim all of the compensation award: 1st—By agreement of the petitioners and the United States, the acreage to be taken by the United States was fixed as a whole for a fixed sum.

2nd—The respondent bondholders had no lien on the lands taken and hence no claim on the compensation award which took the place of the lands.

3rd—The taxes of the petitioners were merged in the tax deeds taken by them to the lands and no longer existed as taxes and the title of petitioners was free of all liens and encumbrances at the time of the filing of the Declaration of Taking by the United States, entitling petitioners to the purchase price of the lands taken.

4th—Petitioners as owners of the lands taken are entitled to the compensation awarded in lieu of the lands and the judgment awarding a part of the award to respondents is a taking of petitioners property without just compensation contrary to the provisions of the Fifth Amendment of the Constitution of the United States.

ERRORS ASSIGNED

The judgment of the Circuit Court of Appeals affirming the judgment of the District Court, finding that petitioners were paid the full amount due them under orders of said Court entered July 11th, 1944, (R-155) is erroneous in that the funds on deposit in the registry were the agreed price of sale of the lands to the United States and not subject to division into acreages or values as the petitioners and the United States had agreed on the terms of the sale and such agreed price became binding on both parties in this condemnation action which was brought by the United States to quiet title (R-104-105).

Petitioners title to the lands involved was free and clear of all liens and encumbrances under Montana Law (R-101) and respondents had no claim to the funds deposited herein in lieu of the lands, respondents having failed to protect their rights in the lands in the many ways provided by Montana Law the award made by the judgment (R-156) affirmed in part by the Circuit Court of Appeals for the Ninth Circuit is erroneous in taking the money belonging to petitioners which in this action is the agreed purchase price of their lands, such taking being contrary to the Fifth Amendment to the Constitution of the United States.

The conclusion number one of the District Court (R-152) is erroneous as a statement of law upon which the judgment entered paragraph one (R-155) can be entered, the said decisions cited in support thereof and as grounds therefore are based upon a "dictum" of the Supreme Court of Montana in which case the said question was not before it for decision, such judgment as affirmed by the Circuit Court of Appeals for the Ninth Circuit being an unwarranted precedent awarding a part of the purchase price of tax deed lands sold by petitioners to the United States to respondents who had no lien on the lands and no legal claim on the funds deposited as the purchase price thereof. Such a precedent should not be established on the law and facts herein.

SUMMARY OF ARGUMENT

(a) The distribution ordered in the judgment entered awarding the remaining funds in the registry of the Court to the bondholders was based upon dicta in a decision of the Supreme Court of Montana in a case where the Court suggested a method of disposition of the funds derived from the sale of the tax deed lands by the county. The Court itself stated the matter was not then before it for decision, and the case is not authority for the conclusions adopted by the trial Court in its judgment.

(b) The judgment entered awarding the funds to the bondholders representing just compensation is a collateral attack on the tax title to these lands owned by the counties and sold to the United States. Such an attack is contrary to the decisions of the Supreme Court of Montana relating to tax deed titles.

(c) The United States and the counties stipulated on the value of the tax deed lands purchased by agreement between them in which the acreage was fixed and no division of such acreage was made by the parties into tracts. Such agreement and stipulation is binding upon both parties.

(d) The bondholders invested in lands subject to general taxation and in order to protect such investment were by law obligated to see that the general taxes levied in each year were paid or the lands redeemed from the tax sale or the bondholders could purchase the outstanding tax sale certificate and take tax title to the lands.

(e) Under Montana law the tax title of the counties was an independent grant from the sovereign and the lands were free from all prior liens and encumbrances including prior tax liens.

(f) The equity rule followed by the Court below does not apply in this case as the award of just compensation is payable only to the owner of the land. The same being free and clear of all encumbrances and liens by the taking of the tax deeds, under Montana law and decisions.

(g) The judgment entered herein sets a precedent on a point of fundamental law not passed upon by the Supreme Court of Montana in its decisions or enacted by Montana Statute Law. The award to bondholders of part of the sale price of the lands taken by the United States of America where they had no lien on the lands under Montana law, if followed, would require the distribution of a part of the sale price of tax deed lands sold by the Counties to be paid to all holders of liens of record prior to the tax deeds which is contrary to express holdings of the Supreme Court of Montana.

ARGUMENT

We call attention to the case (R page 152) relied upon by the bondholders and adopted by the Court in its findings. State v. Board of Commissioners of Cascade County, 89 Montana 37, (1931) 296 Pacific 1. At the outset we call attention to the statement of our Supreme Court on points 17 and 19 thereof as follows:

"The decision of a court in any case should be read in the light of the precise question then under consideration. Cohens v. Virginia, 6 Wheat. 264, 5 L. Ed. 257. This court, speaking through Mr. Chief Justice Callaway, in the case of State ex rel. Walker v. Jones, 80 Mont. 574, 261 P. 356, 360, 60 A. L. R. 551, said: 'It is the rule of universal application that general expressions used in a court's opinion are to be taken in connection with the case under consideration'—citing Bramwell v. United States F. & G. Co., 269 U. S. 483, 46 S. Ct. 176, 70 L. Ed. 368. And again, in the case of Sun River Stock & Land Co. v. Montana Trust & Savings Bank, 81 Mont. 222, 262 P. 1039, 1047, this court said: 'In considering the meaning and intent of the language of an opinion one must have constantly in mind the facts of the case in which the opinion is written. For, as Chief Justice Marshall observed, it is impossible so to use language as that general expressions apply in every instance with the same meaning to every condition of facts'—citing Chater v. San Francisco Sugar Refining Co., 19 Cal. 220."

This case was followed in Edquest v. Tripp and Dragstedt, et al., 93 Montana 446 (1933).

In the case above quoted the Montana Supreme Court had before it for decision this question only whether or not the lien of irrigation district bonds is a general obligation of the irrigation district or merely a charge against the lands within the district and the holding in that case reversed the former decisions of the Supreme Court in the Case of Cosman v. Chestnut Valley Irrigation District, 74 Montana 111, 239 Pacific 879, 40 A. L. R. 1344 (1925).

After determining the matter at issue, the Court went on to say at page 95, Volume 89, Montana Reports:

> "It has been suggested by counsel for respondents that the county hold title to these lands as a trustee. While this matter is not directly before the court for determination, yet we observe in connection therewith that, when the county acquires these lands by tax deed on account of delinquent taxes and irrigation district assessments, it takes and holds such title as a trustee. The moneys derived from the sale of such lands are trust funds. The parties and entities interested in that fund are the school districts within the county, the county itself, the state to the extent of the taxes owing to it, the bondholders, and the holders of the debenture certificates."

The statement of the Court above set forth shows clearly what can happen in a case where the Court endeavors to express its views on matters not before it for decision. In connection with this statement above referred to this Court in the case of Judith Basin Irrigation District v. Malott, 73 Fed. 2nd 142, (1934) 97 A. L. R. 508, made the following pertinent statement:

> "The Supreme Court of Montana in State ex rel. Malott v. Board of County Commissioners, 89 Montana 37, 296 Pacific 1, expressly overruled its previous decisions and decided irrigation district bonds were not the general obligation of the district, but merely a charge against the lands within the district, and that each tract of land was only liable for its proportion of the entire bonded indebtedness. It was also held in that case that when the land had been sold for taxes and when conveyed to the county by tax deed and subsequently sold by the county, as provided by law, that the purchaser acquired the lands free and clear from any lien of the bonds or any future taxation for the payment thereof."

Citing Section 7232 of the Rev. Codes of Montana,

as to the duty to assess the tax annually for the payment of the bonds and at page 514, in 97 A. L. R. point No. 8, "we also suggested that the question of the disposition of the funds derived by the sale of the lands deeded to the county for the State, county and irrigation district taxes suggested by the Supreme Court of Montana in its dictum in the case of State ex rel. Malott v. Board of County Commissioners, supra, was in conflict with the statutory rule Revised Code of Montana, 1921, Section 2235 Subdivision 1, as amended by laws of 1927, Chapter 85, Section 3, in relation thereto.

In the case above quoted, the same question was before the Circuit Court, as was before the Supreme Court of Montana in the case known as the Malott Case, 296 Pacific 1, 89 Montana 37. Subsequent to this decision, which was never appealed to the Supreme Court of the United States for final decision, the United States Supreme Court in the case of Erie Railroad Company v. Tompkins, 304 U. S. 64, 58 SCt 817, 82 LEd 1188, 114 ALR 1457 (1938) held contrary to the Circuit Court's decision in the Judith Basin v. Malott case above referred to, the holding being:

> "The phrase 'laws of the several states,' as used in statute requiring federal courts to apply laws of the several states except in matters governed by federal Constitution or statutes held to include not only state statutory law, but also state decisions on questions of general law, in absence of any constitutional provision purporting to confer upon federal courts power of declaring substantive rules of common law applicable in a state."

This doctrine is followed in the Montana case of Toole County Irrigation District v. Moody, 125 Federal (2nd) 498 (1942).

The Court should not adopt the "dictum" of the Supreme Court in the Malott case herein before cited, as to such doctrine the Montana Courts have held:

> In the case of the Empire Theatre Company v. Cloke et al., 53 Montana 183, 163 Pacific 107. (1917.) "An obiter dictum is a gratuitous opinion, an individual impertinence which, whether it be wise or foolish, right or wrong, bindeth none—not even the lips that utter it."
>
> Mettler v. Ames Realty Co., 61, Montana 152, 201 Pacific 702. (1921.) "Observations made during the course of an opinion upon a subject not involved in the case do not require explanation and are not binding upon the Court." At page 165 the Court says, "The language of Honorable Simeon E. Baldwin is particularly pertinent here: 'If the writer of a judicial opinion has permitted his pen to move too fast and gone beyond the exigencies of the case, it is the strength of our system of remedial justice that his words lose their authority, as soon as the bounds of necessity are passed.'" (Citing 18 Yale Law Journal pages 1-8 inclusive.)
>
> "All that is necessary to make a decision of this Court authoritative is that there shall appear to have been an application of the judicial mind to the precise question adjudged and that the point was fully considered." Spratt v. Helena Power Transmission Company, 37 Montana 60, 94 Pacific 631. (1908.)
> We quote from 14 Am. Jur. 295, Section 83, "The doctrine of stare decisis contemplates only such points as are actually involved and determined in a case, and not what is said by the Court or judge outside the record or on points not necessarily concerned therein.

Such expressions being obiter dicta do not become precedents." Citing State ex rel. Walkel v. Jones, 80 Montana 574, 261 Pacific 356, 60 A. L. R. 551. (1927.)

In the case of Hawks v. Hamill (1933), 288 U. S. 52, 77 L. Ed 610, 53 Supreme Court 240, Justice Cardozo observed: "An opinion may be so framed that there is doubt whether the part it invoked as an authority is to be ranked as a definitive holding or merely a considered dictum. But the result will not be changed though the definition of perpetuities be something less than a decision. At least it is a considered dictum, and not comment merely obiter. It has capacity, though it be less than a decision, to tilt the balanced mind toward submission and agreement.

In controversies so purely local, little gain is to be derived from drawing nice distinctions between dicta and decisions. Disagreement with either, even though permissable is at best a last resort, to be embraced with caution and reluctance. The stranger from afar, unacquainted with the local ways, permits himself to be guided by the best evidence available, the directions or the counsel of those who dwell upon the spot." See also quoting with approval Blue Valley Creamery Co. v. Consolidated Products Co., 1936, CCA 8th 81 Fed. 2nd, 182.

The Court in Carroll v. Carroll, 1853, 16 How U. S. 275, 14 L. Ed 936 held that the duty of the Federal Courts to follow state court decisions extends only as far as the rules of stare decisis permit, and since dicta i.e. expressions not necessary to the actual decision of the controversy before the Court have no value as binding precedents in common law Courts, a Federal Court is not required to follow dictum in a State Court decision.

The Malott case was not followed by any other case reported as to the trustee doctrine where the county acquires

title to lands through tax deeds. It was, however, mentioned in other cases such as River Farms of California v. Gibson, County Treasurer, 42 Pacific 2nd 95 (1935). By statute, the county treasurer was creating a trustee of the irrigation district funds as well as for sale and for redemption of the lands from tax liens. The case cites with approval the doctrine of the Supreme Court of Montana in the Malott case but an examination of the facts and matter for decision before the California Court and Malott case facts and the doctrine set forth therein are entirely different.

In the Utah case, State v. Salt Lake County, 85 Pacific 2nd 858 (1938), the Utah Court refused to follow the doctrine of the Malott case in the following language:

> "Court decisions are authoritative only upon questions of law or facts actually presented, discussed and decided."

In a subsequent decision of the Supreme Court of Montana, State ex rel. Malott v. Cascade County, 22 Pacific 2nd 811, 94 Montana 394 (1933), in which the sole question was the right of the county treasurer to assign tax certificates of sale to a private person who purchased to take tax title to the land and wipe out the lien of irrigation district bonds. The Court held this could not be done, and in its decision cited the Malott case 89 Montana 37, 296 Pacific 1, with approval, but in its decision it referred to debenture certificates which in this particular case had been issued by the county to the irrigation district. In this case

now before this Court there were no debenture certificates involved. The decision above referred to specifically holds:

> "If the land would sell for an amount in excess of the taxes and assessments * * *"

This, of course, was impossible in the instant case. The compensation deposited for the Dawson County lands being $23,526.00, and for the Prairie County lands, $7680.00, which were the amounts for which the counties agreed to sell the lands to the United States. Unpaid irrigation assessments totalled $41,662.98, so that the case is not authority for the trustee doctrine. The statement made pertaining to the irrigation district assessments was not before the Court for decision.

THIS ACTION WAS BROUGHT TO QUIET TITLE

This action was brought and completed to quiet title to the lands as a means of giving the United States a complete and immediate title and possession under the provisions of the Federal Code. The fee was vested in the United States upon the filing of the declaration of taking, the method of payment adopted was by agreement. The condemnation action and award followed the original agreement.

The legal procedure of condemnation was used as a means of determining to whom payment should be made, as well as giving the United States superior rights to the land that could not be obtained under State law as any judgment in a Montana action to quiet title where defendants

are served by public process does not become final until one year after the entry of the decree under the provisions of Section 9187 Revised Codes of Montana 1935.

The bringing of an action to condemn merely for the purpose of quieting title would not alter or change the original agreement of the parties so that the division of the lands into tracts was merely for the convenience of the agencies of the United States who took possession of the land and used it for their purposes. Bank of Edenton v. United States, 4th Circuit, 152 Fed. (2d) 22 1-4, Danforth v. United States, 308 U. S. 271-282, Oliver v. United States, 156 Fed. (2d) 281-282.

> In the Danforth case above cited, "An offer by United States officer to purchase perpetual flowage easement over land for specified amount, in connection with flood control program, mentioning desire to consummate the purchase by friendly condemnation proceedings, was, when accepted, an agreement to fix the price of the easement at the named figure, and was binding in subsequent condemnation proceeding, notwithstanding attempt of the government to withdraw the offer after acceptance."

The lower Court in its decision and order on September 4, 1947, pages 98 and 99 of the Transcript on Appeal makes this statement:

> "The lands embraced in this action were acquired by the Government through an agreement which included total acreage of the purchase and consideration therefor, and also through condemnation proceedings, wherein declaration of taking was filed, (sec. 258a, Title 40, U. S. C. A.), and commissioners were appointed by

> the court to appraise the lands, which was done in accordance with the terms of the aforesaid agreement of purchase; and thereafter they made their return and awarded as just compensation for the same total acreage the same amount of money as had theretofore been agreed upon between the Government and the defendants herein, Dawson and Prairie Counties, which sum was thereafter deposited in the registry of the court.

Our contention is that the counties, after the signing of options to the Government, and stipulating with the Government for the purchase price of the acreage to be taken were in no position to file in the condemnation action any pleading making changes nor in any way abrogating the contract and agreements made, nor can they seek to have the commissioners appointed appraise the land at any greater value by means of appraising tracts where the total value would exceed the agreed price between the United States and the counties. There could and has been no division of the consideration for the acreage sold.

COLLATERAL ATTACK

Under our Court decisions after the taking of lands by tax deed, all liens and encumbrances have been extinguished, including prior tax liens. The bondholders are in such a position now and since the counties obtained the lands by tax title no attack can be made except by direct action. Here the Court's order of distribution is a collateral attack on the tax title as an attempt is made to give part of the just compensation agreed upon and deposited in the registry of the

Court to appellees who had no lien on the lands or from the funds deposited.

On collateral attack our Court has said in Richardson v. Lloyd et al., 90 Montana 127, 300 Pacific 254 (1931), quoting from page 132, Montana Reports:

> "A tax deed operates to divest the original owner of his title to the land. (Sec. 2215, Rev. Codes 1921.) Though subsequent in time, it is paramount in right over the title of the mortgagors, and extinguishes all former titles. (State ex rel. City of Great Falls v. Jeffries, 83 Mont. 111, 270 Pacific 638.)
> The general rule is that a tax title cannot be assailed collaterally, but must be attacked, if at all, in a direct action. (37 Cyc. 1490, note 84; 4 Cooley on Taxation, 4th ed., sec. 1408; West v. Negrotto, 52 La. Ann. 381, 27 South, 75; State Mortgage Corp. v. Traylor, (Tex. Civ. App.) 32 S. W. (2d) 887.)"

In the case of Smith v. Whitney, 105 Montana 523, 74 Pac. 2d 450 (1937), our Court makes this statment:

> "No person may question the validity of a tax sale or deed unless he can first show that he, or those under whom he claims had some title to the property at the time of the sale."

Citing 26 RCL 446, Goldsbury v. MacConnell, 73 Colo. 35, 215 Pac. 872, Hopper v. Chandler, 183 Ark. 469, 36 S. W. 2d 398.

TAX DEED EXTINGUISHES RESPONDENT'S LIEN

The appellee bondholders are in the same position as a mortgagee who loans money on lands and is compelled to pay the general taxes assessed against the lands or lose his security.

> "In the case of State ex rel. Malott v. Board of County Commissioners, 89 Mont. 37, quoting from page 93: 'Under the provisions of section 1928, the school funds of this state may be invested "in first mortgages on good improved farm land in the State of Montana." But, if a loan is made of school funds upon farm lands, the lands are still subject to taxation, and the State of Montana is obliged to protect its loan by the payment of the taxes levied against the land, or suffer the loss of its security through the taking of a tax deed. The bondholders are in the same situation, and may protect their security by either paying the taxes or redeeming the land at any time prior to the expiration of the period for redemption.' "

AGREED PRICE BINDING IN CONDEMNATION ACTION

The Court found that the counties had offered their tax deed lands to the United States for fixed sums to be paid them for the acreages taken (R pages 103 and 104) and the division into tracts was made by the agents of the Government for their convenience, and made this statement:

> "Where the purchase price of property has been agreed upon by the owner and the Government, and the latter should thereafter commence condemnation proceedings, the price agreed upon is still binding upon both parties. Bank of Edenton v. United States (4 Cir.), 152 Fed. (2d) 251-4; Danforth v. United States, 308 U. S. 271, 282; Oliver v. United States, 156 F. (2d) 281, 282;"

The following cases support our case relating to contracts entered into with the Government fixing compensation:

Muschany v. United States, 324 U. S. 49, 89 L. Ed. 744;
Danforth v. United States, 308 U. S. 271-282, 24 L. Ed. 240, 60 Supreme Court 231;
Bank of Edenton v. United States (4 Cir.), 152 Fed. (2d) 251-4;
United States v. North Carolina, 136 U. S. 211, 34 L. Ed. 336;
United States v. Rogers, 255 U. S. 163-169, 65 L. Ed. 566, 41 Supreme Court 281;
Seaboard Airline v. United States, 261 U. S. 299, 305, 67 L. Ed. 644;
Smyth v. United States, 302 U. S. 329, 82 L. Ed. 294.

The question before the District Court was whether the bondholders had a lien upon the lands at the time of the filing of the Declaration of Taking on April 27th, 1942, title to said lands having passed to the petitioners by tax deeds taken in 1931 and 1939.

The disposition of the compensation deposited in the registry of the Court was the sole question for decision herein involving questions of law only.

The Montana Supreme Court has decided the ultimate question involved in this action against the bondholders respondents herein. In the case of Jensen Livestock Co. v. Custer County, et. al., 113 Mont. 285 (124 Pac. (2d) 1013), as follows:

"But a tax deed is not derivative, but creates a new title in the nature of an independent grant from the

> sovereignty, extinguishing all former titles and liens not expressly exempted from its operation. (State ex rel. City of Great Falls v. Jeffries, 83 Mont. 111, 270 Pac. 638; State ex rel. Malott v. Board of County Commissioners, 89 Mont. 37, 296 Pac. 1; Rosebud Land & Improvement Co. v. Carterville Irrigation District, 102 Mont. 465, 58 Pac. (2d) 765.) It is not derived from the fee, but is antagonistic to it and there is no privity between the holder of one and the holder of the other. (Horsky v. McKennan, 53 Mont. 50, 162 Pac. 376.)"

This rule is followed generally throughout most of the states, and in 51 American Jurisprudence, Section 1078, Page 937, the rule is stated as follows:

> "As a general rule, in jurisdictions where the tax is a charge on the land alone, where no resort in any event is contemplated against the owner or his personal estate, and where the proceeding is strictly in rem, the title conveyed by the tax deed pursuant to a valid sale of land for non-payment of taxes is not merely the title of the person who was assessed for the taxes and neglected to pay them, but is a new, complete, and paramount title to the land in fee simple absolute, created by an independent grant from the sovereign, which extinguishes all prior titles, rights, interests, and encumbrances of private persons and all equities arising therefrom, not expressly exempted from its operation, although owned or held by persons not liable for the tax or who were not in default for not paying it."

The bondholders had the right to protect the statutory lien of their bonds by paying the general taxes assessed for state, county and school district purposes; failing to do so, their liens is extinguished by taking of a tax deed by petitioners.

CONCLUSION

The finding of the District Court (R p. 152) followed by judgment in support thereof is erroneous under the facts and law of the case. There were no debenture certificates issued to the irrigation district in this case and hence no interest in the land that would survive the tax deeds taken by petitioners.

The Montana case cited in support of the conclusion of law of the District Court is predicated on the issuance of the debenture certificates and where the irrigation district failed to enforce its rights under the law and allowed all of its legal remedies under Montana law to expire and took no action whatsoever under the laws of Montana, then the conclusion of the Montana Supreme Court in the Malott Case (89M-37) (296Pac. 1) is unescapable that the lien against the lands for irrigation assessment was lost by the tax deed proceedings.

There is no trustee doctrine here as the foundation for such a holding depends on compliance with the laws of Montana, none of which were invoked by the respondents.

They have signally failed to protect any interest or claim they may have had and now seek to secure a distribution of an award made to petitioners by contract with the United States as to amount of compensation to be paid for the lands taken. To take the consideration for these lands taken by condemnation at an agreed price from the petitioners is a taking of their property contrary to the Fifth Amendment

to the Constitution of the United States.

There are no authorities supporting the division of the award to respondents who were without legal right to the same as lienholders or otherwise.

There never has been any distribution of funds derived from tax deed lands sold by the counties of Montana to any holder of a lien on the tax deed lands which was under Montana law extinguished by the taking of tax title. There are no precedents for the judgment herein or the action taken and no statutory provisions authorizing such action.

The facts of this case do not furnish a foundation for the trustee doctrine adopted by the Court in its conclusion of law No. 1 (R p. 152). This is followed by conclusion No. 2, which is contrary to the statute law of Montana, Chapter 63 of the Laws of Montana, 1937, was expressly held by the Supreme Court of Montana to be prospective and not retroactive.

State Ex rel Osten v. Billings 91 Montana 76
5 Pac (2) 562 (1931)
Cascade v. Weaver 108 Montana 1
96 Pac 2 164 (1939)
Hastman v. City of Bozeman 116 Montana 392
154 Pac (2) 279 (1944)

No assessments were made in this case after the issuance of the tax deeds to the petitioners.

Respectfully Submitted,
D. C. WARREN
E. W. POPHAM
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OF COUNSEL: Clarence Hanley, Helena, Montana

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IN THE
SUPREME COURT OF THE UNITED STATES

DAWSON COUNTY, MONTANA and PRAIRIE COUNTY, MONTANA,

Petitioners

VS.

MARY HAGEN, E. B. CLARK, MINNIE R. EVANS, UNITED STATES OF AMERICA, EDNA YALE, ALLEN W. YALE, RUBY YALE, RUTH PETTERSON, HANS PETTERSON, and SCOTTISH AMERICAN MORTGAGE COMPANY, LIMITED,

Respondents

OPPOSING BRIEF ON PETITION FOR WRIT OF CERTIORARI

STATEMENT

Pentitioners' statement is confusing and inaccurate.

The correct title of this action is:

Correct title.

THE UNITED STATES OF AMERICA,
Plaintiff,

VS.

PAUL T. MARKEY, et al,

Defendants.

(R. 2, R. 78):

The Facts.

The findings, conclusions and judgment of the District Court containing all of the facts are set forth in R. 142 to 157.

Condemnation suit.

The government sought to condemn 17 separate tracts in Dawson County, Montana and 7 tracts in Prairie County, Montana, all of which, excepting tract No. 1-12, were within the irrigation district known as Upper Glendive-Fallon Irrigation District a public corporation created on December 20, 1920 and never dissolved and the government joined as defendants all known bondholders of the district, (R. 142).

County Agrees thereto.

The only answer of either petitioner is that of Dawson County (R. 43) which "admits the allegations of plaintiff's complaint" and likewise no contest was made by the bondholders against the condemnation (R. 28).

Questions of Law only on Distribution under 258a 40 USCA.

As found by the district court no question arose in the case regarding the creation of the Irrigation District and the proceedings in regard thereto with the map thereon showing the pumping plant, canals and laterals and the two lifts, a fory-foot lift and a seventy-five foot lift were introduced in evidence. The district was established by the judgment of the state district court and the court authorized the issuance

used to purchase a coal mine and to construct a pumping plant and the canals and laterals of the district. The plans were approved by the Public Service Commission of Montana.

No question arose regarding the validity of the general taxes or the validity of the irrigation district assessments, all of which were merged and taxes were levied upon the lands in question, other than tract No. 1-12.

Lien of Bonds prevented government from buying from county.

The government did have negotiations with Dawson County to buy the lands in question but it was unable to convey satisfactory title and hence the condemnation proceedings followed, (R. 151). The answer of said county shows definitely such negotiations and the offer of the county, but the county could not sell and did not attempt to sell the rights of the bondholders, (R.43). In the answer of Dawson County commencing at R. 44, it is set forth that the lands in question were covered by tax deed for taxes "levied by the State of Montana, Dawson County, Montana, and school districts, and taxes levied by Upper Glendive-Fallon Irrigation District, a public corporation" and set forth as to each tract of land in the county involved the general taxes and the irrigation taxes, levied and assessed and all of same were included in amount upon which the tax deed was obtained by the county.

of the bonds and the funds obtained therefrom were

County admitted sale of lands must be subject to lien of bonds.

After the tax deed was obtained the county passed a resolution for the sale of the property (R. 52, 53) but expressly recited therein that the sale was to be:

> "subject to the lien of the unpaid balance of certain Bonds issued by the Upper Glendive-Fallon Irrigation District Jan. 1, 1923." and

the notice given on the attempted sale, recited:

> "and all of the above lands described as being in Township 13 are subject to the lien of the unpaid balance of certain bonds issued by the Upper Glendive-Fallon Irrigation District January 1, 1923."

The district court found all the bonds were dated and issued January 1, 1923, redeemable in 20 years with interest at 6% and were sold by the commissioners of the irrigation district and attached to each bond was the certificate of the Public Service Commission of the State that the bond was legally issued and each bond was registered with the county treasurer and negotiated for cash in good faith to innocent holders, (R. 148, 149).

The tax deed in Dawson County for the lands in the irrigation district was taken on December 11, 1939, (R. 150).

Counties have been paid all general taxes.

Pending condemnation and after deposit Dawson County petitioned for and obtained payment of all general taxes claimed by it against the lands (R.67)

in sum of $10,628.57 which were due at time tax deed was taken and such order recited the irrigation assessments then delinquent and unpaid amounted to $41,662.98.

The judgment of condemnation followed the government complaint, (R. 78, 82) and the award of commissioners, (R. 69).

There then remained only the payment of the balance of the money on deposit, which represented the land, to those entited thereto and as the court found to be just and equitable under Section 258a, U. S. C. A.

The Trial Judge entered judgment based on findings to which no exceptions were made, (R.142 to 157).

Counties over-paid on deposit under 258a U. S. C. A.

On Tract No. 494-8, 494-11 and 494-13 Dawson County was over-paid $3,315.06 and Prairie County was overpaid on Tract No. 511-6 $327.86, more than the general taxes and the order of partial distribution made on July 11, 1944 (R. 67) was a mistake and was corrected by the final judgment (R. 147, 156). But the Circuit Court of Appeals modified the judgment by eliminating any requirements that the government repay that amount or that the counties return the over payment.

The District Court changed the boundaries of the Irrigation District and excluded Tract No. 1-27 and Tract 1-47 and 1-53 and also denied the bondholders appearing attorneys fees to be paid by all bondholders pro-rata.

A cross-appeal was taken to the Circuit Court on the last items but judgment was affirmed thereon without express decision.

The only question now presented is whether the counties can take all the remaining money on deposit and exclude all rights of the bondholders.

The bondholders appearing are Mary Hagen, E. B. Clark, and Minnie R. Evans on their own behalf and on behalf of all the bondholders of the Irrigation District.

It will be noted Prairie County has presented no pleading or record other than it joined in the notice of appeal given by Dawson County, (R. 157).

ARGUMENT

QUESTION INVOLVED

Summary of Petitioners theory.

Petitioners claim the counties could take tax deeds to the lands for the amount of general taxes and irrigation taxes levied by Upper Glendive-Fallon Irrigation District, a public corporation, and then exclude the district and the bondholders from any interest in the lands or the proceeds on sale thereof.

Respondents contention.

On the other hand, the bondholders contend that the statutory law of the State of Montana, hereafter cited and controlling, adequately creates and protects the lien of the bonds and such rights in confirmation of the statutes are guaranteed by the decisions of the highest court of Montana without conflict.

No Federal question or conflict.

Here there is no federal question involved and the decision of the Circuit Court is not in conflict with the decision of another Circuit Court and the decisions rendered by the Circuit Court of Appeals and by the District Court do not decide any important question of local law in any way in conflict with other applicable local decisions and there is no special or important reason that this Supreme Court should take jurisdiction.

This is a condemnation proceeding and the judgment in condemnation (R. 78) stands without appeal.

Montana statutes.

The Montana Law on Irrigation Districts is found in the Revised Codes of Montana, 1947, Sections 89-1201 to 89-2128, which are the same as Sections 7166 to 7264.18 of the Revised Codes of 1935 and practically the same as Sections 7166 to 7264 of the Revised Codes of 1921 in force when the bonds were issued. The judgment creating the district was entered by the state district court on December 2, 1920.

Section 89-1204, 1947 Code, makes the order creating the district conclusive unless appeal be taken in 60 days, and the district so established thereby became a public corporation for the promotion of the public welfare.

The next step was to provide for irrigation by construction of an irrigation system which required funds obtainable only through sale of the bonds which

in this case were issued by the commissioners of the irrigation district and confirmed by judgment of the district court following 89-1704 of the 1947 Code, and again the statute provides that such judgment shall be forever conclusive upon all the world as to the validity of such bonds.

The list of the bondholders (R. 41, 42) shows the bonds were sold to the general public, banks and estates, over a wide area and the petitioners admit, page 5 of their brief, that the principal of all bonds remain unpaid and interest since January 1, 1928.

(Bonds a Lien)

Section 89-1706, 1947 Code, which is the same as when the bonds were issued, expressly provides that all bonds:

> "shall be a lien upon all the lands originally or at any time included in the district * * * and said special tax or assessment, shall constitute a first and prior lien on the land against which levied, to the same extent and with like force and effect as taxes levied for state and county purposes."

Sections 89-1801 to 89-1832 of 1947 Code provide for the levy and collection of irrigation district taxes and assessments, and Section 89-1801 reads in part: "all bonds and the interest thereon *** shall be paid by revenue derived from a special tax or assessment levied as hereinafter provided upon all the lands included in the district" and the statute made it the duty of the district commissioners to make an annual levy and collection of a special tax or assessment upon all the lands in the district sufficient to pay the interest

and principal of the bonds and Sections 89-1811 and 89-1812 made it the duty of the county treasurer to collect such taxes and assessments in the same manner and at the same time as county and state taxes and he was made the custodian of all such funds. Section 89-1815 provides that sales for delinquent taxes or asessments of the district shall be made in the same manner as for state and county taxes. And Section 84-4108 of 1947 Code makes it the duty of the county treasurer of each county in which any irrigation district is located to collect all taxes and assessments of the district. Following the general rule the process of collecting is to sell the land and issue tax certificates of sale (84-4124) and a tax deed, Section 84-4157.

Section 89-1816 requires whenever any lands within an irrigation district are sold for delinquent taxes and include such taxes and assessments for the district the county treasurer must place to the credit of the funds of the irrigation district out of the proceeds of sale the total tax or assessment of the district with the interest and penalty and further that:

> "whenever any such lands are struck off at such sale to the county wherein the same are situate, pursuant to the provisions of section 84-4124, the county treasurer of such county must, upon the issuance of the certificate of tax sale to said county, issue to said irrigation district, and in its corporate name, a debenture certificate for the amount of taxes and assessments due to said irrigation district from said lands and premises, inclusive of the interest and penalty thereon, which certificate shall be evidence of and conclusive of

> the interest and claim of said irrigation district in, to, against, and upon the lands and premises so struck off to said county at such tax sale, and from and after the issuance of said certificate, the sum named therein and the taxes and assessments of said district evidenced thereby shall bear interest at the rate of one per centum per month from the date of said certificate until redeemed in the manner provided by law for the redemption of the lands sold for delinquent state and county taxes, or until paid from the proceeds of the sale of the lands and premises described therein."

Attention is also called to the fact that

"Whenever property sold to the county *** is redeemed *** the moneys received on account of said redemption" must be distributed to the various funds according to the levy, (Section 84-4189, 1947 Code) and in irrigation districts the county treasurer is specifically directed to apply such redemption money to the assessments or debenture certificates, Sections 89-1816 and 89-1818.

Under Section 89-1819 when such lands of the irrigation district so sold for taxes are not redeemed within the time provided by section 84-4132, it was made the duty of the board of county commissioners within three months thereafter to sell such lands and out of the proceeds of sale to pay the taxes and assessments due the irrigation district and covered by the aforesaid certificates and when the land was struck off to the county like certificates were issued and paid from the proceeds of the sale of said lands (Section 89-1820).

Likewise under the general tax law upon the sale by the county of lands acquired for delinquent taxes the proceeds shall be applied to the funds according to the levy or apportioned according to aggregate levy. (see Section 84-4195).

Here, the district had never been dissolved and the duty of the district commissioners continued to make levy of taxes to pay the interest and principal of the bonds to protect the lien thereof and the legislature of Montana in order to further protect such irrigation bonds provided:

> "Section 84-4170 (2215.9) Effect of deed. The deed hereafter issued under this or any other law of this state shall convey to the grantee the absolute title to the lands described therein as of the date of the expiration of the period of redemption, free of all encumbrances and clear of any and all claims of said defendants to said action except the lien for taxes which may have attached subsequent to the sale and the lien of any special local improvement, irrigation and drainage assessment levied against the property payable after the execution of said deed."

Under Section 89-1813 the county commissioners of the county have the duty to levy irrigation taxes and assessments for the protection of the bondholders if the district commissioners fail to do so.

Hence, under the basic law of Montana the irrigation bonds are established as liens on all lands within the district and the county as well as the district commissioners must not only provide a levy but must also collect the taxes and when collected must be used

to pay the interest and principal of the bonds and when the real estate is sold for delinquent taxes or assessments certificates thereon must be issued and when the county acquires tax title the lands must be sold and the proceeds of sale applied to such taxes and assessments of the district.

Under no possible theory could the county escape making levy of the irrigation assessments or fail to protect same by sale of the lands and application of the proceeds and it is difficult to understand how anyone could conceive that the county could by acquiring a tax deed defeat the assessments for which the tax was levied and which was the foundation for the tax deed!

The law imposes a mandatory duty upon the county for the protection of the bondholders which cannot be avoided.

It will be noted that the tax deeds to Dawson County were issued December 11, 1939 as to the lands in question and so found by the District Court, (R. 148, 97). The last amendment to Section 84-4170 was enacted prior to such deeds by Chapter 63, Laws of 1937.

Under that law the legislature made the subsequent assessments for irrigation a lien on the lands held by the county under tax deed and there was no way for the government to acquire title and exclude the liens of the bonds except by condemnation as was done.

Montana decisions regarding our irrigation law.

State ex rel. Mallott v. Board of County Com-

missioners 89 Mont. 37, 296 Pac. 1; and State ex rel. Malott V. Cascade County, 94 Montana 394, 22 Pac. (2d) 811, establish, the general rule that the law in force when bonds are issued become a part of the contract of the bondholders based on the rule that no state may pass any law impairing the obligation of contracts.

Petitioners brief is largely based upon a criticism of the case reported in 89 Montana 37, above cited but the court will find that the case has been subsequently approved by Montana Supreme Court in many, many cases.

The county is prohibited from claiming that it did not perform the official duty imposed by law. That is the statutory rule, 93-1301-7, subdivisions 15 and 33. In State ex Rel. Wolff, v. Geurkink 111 Mont. 417, 109 Pac. (2d) 1094, it was held that where the duty is plain and fixed by statute the performance thereof becomes a ministerial act and the officers must perform same without inquiry into the facts and hence in this case under Section 89-1816 the county treasurer was obligated by law to issue debenture certificates to protect the irrigation taxes and assessments and it was held in 94 Mont. 394 above cited that:

> "When the lands are struck off to the county and the debenture certificates are issued as required by the law, the county occupies the position of a trustee for the interested parties, including, of course, the bondholders* * * the county, as trustee cannot lawfully do anything adverse to the rights of the bondholders, beneficiaries under the

> trust. After issuing the debenture certificate it can perform but two acts (or related acts) with respect to the lands: (1) Receive money paid upon redemption and distribute the same; (2) obtain a deed to the lands, sell the same, and distribute the money received upon sale."

In that case the court held that the bondholders were not required to redeem from tax sale and further said:

> "But in view of the law it is the duty of the county commissioners to apply for tax deeds to enable the county to sell the land and to apply the proceeds as directed by law. (State ex rel. Malott v. Board of County Commrs., 86 Mont. 595, 285 Pac. 932.) This is but one of the puzzles which may be expected to appear from time to time in the operation of Montana's maladroit irrigation law. However, the rationale of the law compels the conclusion that, when irrigation district lands are struck off to the county and under statutory direction debenture certificates have been issued therefor, the county becomes a trustee and never discharges its trust until the lands are redeemed from sale, or, if not, until it sells the lands and distributes the proceeds agreeable to equity."

In the case 89 Mont. 37, the court also approved the rule that when the county acquired the tax deed on account of delinquent taxes and irrigation district assessments it takes and holds title as trustee and the moneys derived from the sale of land are trust funds in which the bondholders are interested. That statement merely followed the expressed provisions of the statute. Subsequent to the decision in that case the legislature enacted or amended Section 84-4170 to protect subsequent assessments for the benefit of the bondholders.

It will be noticed that in the case of Rosebud Land & Improvement Co. V. Carterville Irrigation District 102 Mont. 465, 58 Pac. (2d) 765, a direct attack was made upon the Malott Case 89 Mont. 37 and after a review of all of the cases it was reaffirmed. That case was decided June 15, 1936 and prior to the enactment of Chapter 63 of the Laws of 1937 approved February 25, 1937 which protected subsequent irrigation assessments.

The first Malott Case was approved in Toole County Irr. Dist. v. State, 104 Mont. 420, 67 Pac. (2d) 989 where the court reviewed our irrigation law.

In Krueger V. Morris 110 Mont. 559, 107 Pac. (2d) 142 court again approved the first Malott case and held that the irrigation bonds "must all be regarded as valid, and we must also treat the bonds as constituting liens upon the entire property of the district".

Here there is no claim on the part of the bondholders that the counties are not entitled to payment of the general taxes which has been done but in view of the fact that the U. S. Government in condemnation has made all the bondholders parties defendant of necessity they must protect the liens of their bonds upon the lands and upon the compensation paid therefor, as otherwise if the bondholders should be compelled to sue the counties for an accounting or apportionment, the counties would plead res adjudicata and claim the bondholders were barred by the judgment in this action.

The Malott case was also approved in Toole County Irr. Dist. v. Moody, 125 F. (2d) 498 where the Ninth Circuit Court of Appeals construed Montana Irrigation law.

The trustee rule adopted in the Malott case was also followed in State ex rel. v. Rorabeck, 111 Mont. 320, 108 Pac. (2d) 601, the court said:

> "The principal and interest on the bonds were payable out of a particular fund exclusively, of which the county treasurer was custodian (sec. 7213, 7232., Rev. Codes 1921). The officers of the irrigation district who must provide for the levy and collection of a tax sufficient to meet the interest and principal, and the county treasurer who is made the custodian of the funds of the district, stand in the relation of trustees for the bondholders of the dirtrict."

The trustee or agency doctrine of the county is applied generally in regard to tax funds.

In the case of State ex rel. City of Wolf Point v. McFarlan 78 Mont. 156, 252 Pac. 805, decided prior to the first Malott case, the county treasurer sought to avoid payment to the city on taxes levied by the city. There the statute required the County Treasurer to collect the taxes levied by the city at the same time as state and county taxes and the court said:

> "In collecting city taxes the county treasurer does so as agent of the city. Nowhere, so far as we are aware, is there any provision for his remuneration for his services in collecting taxes, interest and penalties due the city. Nor need there be. He is a public officer, paid by the public, and there can be no doubt of the power of the legislature to include in his duties that of collecting and

paying over to a city in his county taxes caused to be levied in pursuance of law by the city authorities."

In that case the rule was applied to special improvement assessments and it was held that neither the county or the treasurer had any right to retain taxes for the city or for special improvement assessments.

A similar question arose in School District No. 12 v. Pondera County, 89 Mont. 342, 297 Pac. 498 where the question at issue was whether the school district was entitled to its pro rata share of interest and penalties paid on delinquent taxes and following the general statute the court held that the law required that the funds be pro rated according to the levy and although the money there was not paid on redemption all of the moneys received on sale of the land by the county had to be pro rated and that the county treasurer was merely acting for the school district and the funds "in the hands of the treasurer were trust funds".

Applying the same theory in another case entitled State ex Rel. Malott v. Board of County Commissioners 86 Mont. 595, 285 Pac. 932, which was an action requiring the county officials to apply for a tax deed in favor of the county to enforce the special assessments in an irrigation district and the court reviewed the general tax laws and the special laws in regard to irrigation districts especially where the county had become the purchaser of the lands, and held that when

a public body or officer has been clothed by statute with power which concerns the rights of third persons no mere discretion was involved but there was imposed a positive and absolute duty and the following language in the decision is appropriate to this case:

> "The sovereignty of the state of Montana for public welfare has authorized the organization of irrigation districts in the state in aid of agricultural development; it has given recognition of them as municipal corporations, clothed them with authority to issue and sell bonds upon the faith and credit of the district for the purpose of obtaining requisite financial assistance, and assured investors in such bonds of their payment through the machinery of the law. Admittedly, the irrigation district has had the use and benefit of the money obtained on sale of the bonds for its purposes, and to now permit the board of county commissioners to frustrate their payment from the lands embraced in the district upon technical grounds, or because of alleged discretion vested in it, would work a manifest fraud and injustice upon innocent parties who have honestly and fairly parted with their money in reliance upon the faith and credit of the irrigation district and the protection afforded by the laws of the state. Public municipalities should be held to the strictest accountability in payment of their obligations according to law, so as not to reflect discredit upon them or the state."

Dictum

In view of the statutes and the many decisions cited which announce the rule governing without conflict, it is absurd to discuss the alleged dictum in the Malott case, which consumes so much of petitioners brief; (pages 14 to 20).

Condemnation—Not Suit to Quiet Title.

Petitioners next seek to repudiate the condemnation proceedings and assert that the government brought action to quiet title, which is a denial of the complaint in condemnation (R. 2), agreed to in its answer by the county, (R. 43), and the county can not now repudiate the judgment in condemnation (R. 78) nor the findings, conclusions and judgment of the district Court (R. 142 to 157) from which petitioners appealed.

The eminent domain proceedings did not change the status of the county and the bondholders as to the lands involved. All property is subject to that power, 29 C. J. S. 852.

It is an involuntary sale for which full compensation is paid.

The government obtained title to the land in fee simple absolute and the right to compensation vested in the persons entitled thereto and the statute reads:

> "The Court shall have power to make such orders in respect of incumbrances, liens, rents, taxes, assessments, insurance, and other charges, if any, as shall be just and equitable."

(40 U. S. C. A. Sec. 258a.)

The law allows market value fairly determined and no appeal having been taken from the award it conclusively stands as perfect equivalent in money for the lands. In State v. Lee, 103 Mont. 482, 63 Pac. (2d) 135, the court held the market value is the price that

in all probability would result from fair negotiations where the seller is willing to sell and the buyer desires to buy.

When the government commenced its condemnation the county had proceeded under Sections 89-1816 and 89-1817 and no redemption had been made and it was then the duty of the county to sell the lands as directed by Section 89-1819 and such statutes fully protect the taxes and assessments of the district for the benefit of the bondholders.

While section 89-1816 and 89-1819 both refer to section 2235 of the code, as to disposition of proceeds and sale of lands, it will be noted section 2235 has been amended and is now section 84-4195 which provides that upon sale of the property of lands acquired by the county under tax deed the proceeds shall be applied to each tax fund for benefit of the taxes and assessments as would have been done if the lands had been redeemed and the taxes and assessments paid.

It must be kept in mind that the law of Montana provides only one method of collecting the taxes and irrigation assessments and only one tax deed into which is merged all taxes and assessments levied and, where the lands are not purchased by third persons, the county automatically becomes the purchaser and holds tax title for the benefit of the public divisions according to the taxes and assessments levied. Here the lien of the bondholders continued until the bonds were paid in principal and interest and to the extent

of the compensation remaining after payment of general taxes the Federal District Court satisfied such liens under Section 258a.

The position here of the county, in that respect, was absolutely no different than if the county had sold the lands under Section 84-4190 to 84-4195.

Tax deeds here did not destroy bondholders' liens.

Finally, petitioners contend the counties owned aboslute title to the lands involved under the tax deeds and it is claimed the tax deeds extinguished the liens of the bondholders.

Such contention, if upheld would, repudiate and set at naught the clear statutory provisions outlined and the existing Montana law governing sale of county tax deed lands and apportionment of proceeds of sale and also rejects the positive rules of law adopted by the Supreme Court of Montana in the decisions cited.

If an individual should buy the lands from the county the provisions of Section 84-4195 and Sections 89-1816 to 89-1819 would apply and the proceeds of sale would be apportioned as the law directs. However, it must be observed that under the present law upon the issuance of the tax deed, even in the hands of the county, the lands become subject to irrigation assessments subsequently levied. In that respect the law has been changed since the decision in the Malott case, 89 Mont. 37. If petitioners had observed the ruling in the Malott case in 94 Mont. 394 at p. 403, the distinction between the individual buying and the county buy-

ing would have been apparent, as it was said:

> "It is argued that Mr. Thelen could have purchased the property when it was offered at tax sale, and, barring redemption, he could obtain a deed for the property, which would obviate the lien of the bonds. This is true, but an individual dealing at arm's length in purchasing property at a tax sale is in a different position from that of a governmental agency operating under statutory direction as a trustee. Had Thelen purchased the property at a tax sale, no debenture certificate would have been issued."

Petitioners have cited State ex Rel. City of Billings, v. Osten 91 Mont. 76, 5 Pac. (2d) 562 on theory that the county of Dawson **was not** bound by or affected by subsequent legislation, such as 84-4170 particularly as to assessments subsequent to tax deed to protect lien of bondholders and 84-4195 as to apportionment of proceeds of sale of tax deed lands for benefit of assessment levies made also for protection of the bondholders.

However, that case clearly makes the distinction between individual purchasers and government agencies, such as the county, and at page 81 of 91 Montana report in that case the court reaffirms the general rule that the tax deed is to be determined by the statutes in force when the sale was made and not by statutes subsequently enacted,

> "for, **EXCEPT AS TO GOVERNMENT AGENCIES**, the sale of land for delinquent taxes constitutes a contract" etc.

On page 82 of the same report, the court said:

> "Nor do we overlook the possibility that the **title of the county, a government agency, may be affected by subsequent legislation;"**
> (emphasis added)

The subsequent legislation is unimportant here because at the time of the issue of the bonds and ever since the liens thereof were fully protected by Sections 89-1816 to 89-1819 of 1947 Code.

Counties are pure creatures of the law.

In Franzke v. Fergus County 76 Mont 150, (at p. 154), 245 Pac. 962, the court said:

> "A county is merely a subdivision of the state for governmental purposes, and as such is subject to legislative regulation and control, except to the extent that the Constitution has restricted the law-making body. Within those limitations the legislature may circumscribe or extend the powers to be exercised by a county as it sees fit. *** and since our Constitution has not limited the authority of the legislature to regulate or control the disposition of county property, the right of the legislature to say that such property may be sold only under the restrictions and in the manner indicated by the statutes cannot be questioned;"

CROSS-ASSIGNMENT OF ERRORS

If this Supreme Court should grant the Writ which we oppose, we then respectfully submit, the entire case should be considered.

In the bondholders' Cross Appeal to the Ninth Circuit Court of Appeals, it was contended the District Court erred in attempting to re-establish the boundaries of the irrigation district to exclude Tracts 1-27

and 1-47 and 1-53 which deprived the bondholders of $1183.00.

It was also contended the fees and expenses should be pro rated among all bondholders as they share alike in the distribution pro-rata. That was denied, and we claim the court erred. The Circuit Court of Appeals affirmed the judgment without comment thereon.

Modification of judgment by Circuit Court of Appeals.

The District Court considered an over-payment had been made to the counties in excess of the award and to the loss of the bondholders as set forth in Finding of Fact No. 5, (R. 147). The District Court recognized that a mistake had been made in the partial distribution through its order of July 11, 1944, (R. 67) due to the fact the award of the commissioners was not made until September 29, 1945, (R. 77) and final judgment in condemnation not until Dec. 5th, 1945, (R. 90.)

The District Court followed Section 258a in that respect and should not have been put in error. That modification cost the bondholders $3642.92 besides interest.

The bondholders did not consider and do not now consider the case involves any special or important reason for the Writ of Certiorari but we contend, if granted, then the entire case should be considered and all errors reviewed.

CONCLUSION.

We have endeavored to answer petitioners brief,

and, while both the District Court and the Circuit Court of Appeals have reduced the amounts we contend are due the bondholders, the courts have not decided any important question of local law in any way in conflict with the governing statutes or applicable local decisions. This is just an ordinary suit in condemnation, wherein the counties have unjustly profited at a loss to the bondholders.

The bondholders claim Dawson County did not sell the lands to the U. S. Government but if the sale had in fact been made by the county to the government, as now claimed by petitioners, the same apportionment of proceeds of sale would be necessary under Section 84-4195 and 89-1816 to 89-1819 of 1947 Code.

The only hope or chance of the Counties to defeat the liens of the bondholders is to have this Court hold the counties are entitled to all of the compensation and that the bondholders are entitled to none thereof, as otherwise under the statutory provisions cited the counties must make apportionment of proceeds.

Insofar as the United States Supreme Court is concerned, it would seem unimportant whether distribution of sale proceeds be made by the condemnation court or by the state court.

However, under the condemnation law, here involved, the Federal District Court has the exclusive right and duty to make distribution, the statute directs:

"The court shall have power to make such orders

in respect of encumbrances, **liens**, rents, **taxes, assessments,** insurance, and other charges, if any, as shall be just and equitable." (Sec. 258a, 40 U. S. C. A.) (emphasis added)

The compensation is directed to be paid on application of the parties in interest on account of the just compensation.

(See United States of America v. Miller, 317 US 369, 87 L ed, 63 S. Ct. 276, 147 ALR 55)

Respectfully submitted,

H. Lowndes Maury

Attorney for Respondents.

D. J. O'Neil and P. F. Leonard of Counsel.

In the Supreme Court of the United States

OCTOBER TERM, 1949

No. 507

DAWSON COUNTY, MONTANA, AND PRAIRIE COUNTY, MONTANA, PETITIONERS

v.

MARY HAGEN, E. B. CLARK, MINNIE R. EVANS, UNITED STATES OF AMERICA, EDNA YALE, ALLEN W. YALE, RUBY YALE, RUTH PETTERSON, HANS PETTERSON, AND SCOTTISH AMERICAN MORTGAGE COMPANY, LIMITED

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES

The petition for a writ of certiorari seeks to review a decision of the United States Court of Appeals for the Ninth Circuit (*Dawson County, Montana, et al.*, v. *Hagen, et al.*, 177 F. 2d 186; R. 181-182). It is the purpose of this memorandum to state the position of the United States with respect to this litigation.

In condemnation proceedings brought by the United States, the amount representing just compensation for the property had been paid into court (R. 90), and $3,642.92 had been distributed to Dawson and Prairie Counties, Montana (R. 98-99). The

trial court having concluded that this distribution was erroneous, entered judgment against the United States in favor of Mary Hagen, et al., the defendant bondholders of the Upper Glendive-Fallon Irrigation District, for $3,642.92, and a judgment in favor of the United States against Dawson and Prairie Counties, Montana, for the same amount (R. 155-156). Upon appeal by the United States (R. 173) the court of appeals recognized the Government was not responsible for errors in distribution of the amount representing just compensation for the land condemned, and hence its judgment modified that of the district court to eliminate any requirement that the United States pay any sum in addition to the amount previously awarded (R. 182-183). Petitioners are not assigning this phase of the decision of the court of appeals as error. Their petition relates to the distribution of funds paid by the United States as just compensation, no claim being made that the amount owing by the United States is more than the sum that has been paid into court.

Since the United States is not concerned with proceedings for distribution (*United States* v. *Dunnington,* 146 U. S. 338, 352), it has no interest in the present petition. Accordingly, it neither joins in nor opposes the petition for writ of certiorari.

Respectfully submitted,

PHILIP B. PERLMAN,
Solicitor General.

JANUARY, 1950.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1950 870479 433